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No. 88-327

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BUDDY ROEMER, et al.,
Petitioners,

vs.

RONALD CHISOM, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* FOR THE STATES OF TEXAS, ARKANSAS, FLORIDA, GEORGIA, ILLINOIS, AND NORTH CAROLINA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Attorneys General of the *amici curiae* States of Texas, Arkansas, Florida, Georgia, Illinois, and North Carolina, *see* Appendix, sponsor this brief, pursuant to Supreme Court Rule 36.4, to bring to the attention of the Court an issue of significant and potentially disruptive impact on state judiciaries.

In *Chisom v. Edwards*, 839 F.2d 1056, 1064 (5th Cir. 1988) ("*Chisom*"), the decision from which Louisiana petitions for a writ of certiorari, the Fifth Circuit held that section 2 of the Voting Rights Act "does apply to state judicial elections." The *Chisom* decision casts a cloud of uncertainty over the forty-two states that have either judicial elections or judicial retention election systems. *See* Louisiana's Petition For A Writ of Certiorari, at 10-11. Already, at least six section 2 suits have been filed challenging the judiciaries of Alabama, Georgia, Illinois, Mississippi, and Texas. The Illinois suit encompasses 201 state judges, Louisiana's Petition, at 8-9, and a Texas suit, 206 judges.

Only a definitive statement from this Court determining whether the *Chisom* principle is correct can remove the cloud of uncertainty and permit the states to order their affairs under clearly discernible governing legal principles. To remove all doubt, the Court should grant certiorari and decide whether the principle enunciated by the *Chisom* court is correct. If the Court does not act, however, premature remedies pursuant to *Chisom* could unnecessarily disrupt the forums where the majority of this Nation's lawsuits are tried: elected state trial courts.

Quick action also is necessary to maintain the delicate balance in this important area of state-federal relations. State governments, in our constitutional scheme, act as independent political communities with the authority to make important decisions of self-governance. *See, e.g., Lane County v. Oregon*, 7 Wall. 71, 76 (1869). Perhaps no incidents of state self-governance are more central to concerns of federalism than the preservation of the integrity

of state law and the protection of the institutional autonomy of state judiciaries. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983); *Younger v. Harris*, 401 U.S. 37 (1971). As the Court has noted, "in a Union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, **particularly with the operation of state courts.**" *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977) (emphasis added).

Indeed, the recent Fifth Circuit decision in *Chisom v. Roemer*, 853 F.2d 1186, 1188-89 (5th Cir. 1988) ("*Chisom II*"), illustrates the urgent need for this Court's action and guidance. The Fifth Circuit in *Chisom II* vacated the district court's preliminary injunction enjoining the election of a justice of the Louisiana Supreme Court partly on the basis that "the Supreme Court has yet to speak on the critical issue whether section 2 of the Voting Rights Act applies to judicial elections[,]" and because it did not want to unnecessarily intrude upon an important area of state-federal relations such as a "state's judicial process."

The issue presented here could fundamentally alter state courts, a bedrock institution in our society of laws. A decision now by the Court clarifying the reach of section 2 is necessary to prevent undue interference with the operation of state courts and to provide guidance to federal courts struggling or soon to be struggling with *Chisom*-generated questions.

SUMMARY OF ARGUMENT

The *Chisom* holding that judicial elections are covered by section 2 of the Voting Rights Act sets in motion events that soon will cascade into an avalanche of litigation seeking to change the way state judiciaries are elected. The litigation will be complex and time-consuming. It could result in court-ordered reconfiguration of several states' judicial systems and implementation of the novel concept of electing judges from single member districts.

States need to know now from the Court whether their current judicial election systems are going to be measured by a results test in a vote dilution claim under the Voting Rights Act. Only then will the states be able to assess their election systems in the clear light of the law and determine with some degree of certainty the proper response to anticipated, threatened, or actual litigation. Some may choose to reconfigure without a lawsuit or trial, while others may choose to litigate the issue. All states, though, at least will know the ultimate evidentiary standards and what proof must be offered.

While there admittedly is no conflict in the circuits on the *Chisom* principle, the issue is too important and the state judiciary too critical an institution for the Court to await further judicial developments before settling the question. It is a straightforward issue of statutory construction, ultimately hinging on the meaning of a single word, "representatives."

The Fifth Circuit's analysis was too facile to definitively settle the question analytically, transgressing elementary principles of statutory construction in reaching its conclusion. The plain, commonly understood meaning of "representatives" cannot be said to include judges. If Congress had meant to take the major step of subjecting a major state institution to new federal standards (as the Fifth Circuit has now decided Congress did) surely there would have been at least a modicum of debate on the matter. There was none at all. Plain language aside, this Congressional silence suggests that the thunderous step really was not taken and, therefore, that the Fifth Circuit was wrong.

Before state judiciaries are subjected to major alterations, before attorney fees mount, and before lengthy trials begin, the states urge the Court to settle the controlling legal principle and tell them the basic standard by which they are to be judged.

ARGUMENT

I. The 1982 Amendment to the Voting Rights Act

Congress under the aegis of the Fifteenth Amendment enacted the Voting Rights Act of 1965 ("1965 Act"), to "banish the blight of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The heart of the 1965 Act consisted of specific remedies to break down the most commonly erected barriers that perpetuated voting discrimination. *Id.* at 315-16 (discussing the impact of sections 3, 4, 5, 6, 7, 9, 12 and 13). Congress, tracking the Fifteenth Amendment, enacted a general precatory provision, section 2, which "broadly prohibit[ed] the use of voting rules to abridge exercise of the franchise on racial grounds." *Id.* at 316.[1]

In *City of Mobile v. Bolden*, 446 U.S. 55, 60-61, 65 (1980) (*"Bolden"*), the Court reasoned that section 2 of the 1965 Act "no more than elaborates upon . . . the Fifteenth Amendment, and the sparse legislative history of section 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." It then held that section 2 prohibits only intentional acts of discrimination which deny or abridge the freedom to vote.

In response to *Bolden*, Congress amended section 2, dividing it into two subsections. In subsection (a), it added

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1 As originally enacted, section 2 of the 1965 Act provided that:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973(a) (1982)).

a "results" test to the original section 2 language,[2] and it added new language as subsection (b), which states in pertinent part:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect **representatives** of their choice.

42 U.S.C. § 1973(b) (1982) (emphasis added).

Thus, through a clause in subsection (a) and the introductory clause in subsection (b), Congress reinstituted a "results test" similar to the one applied in *White v. Regester*, 412 U.S. 755 (1973) ("*White*"). Although the results test removes the necessity of proving intent to establish a section 2 violation, its inclusion did not come without political compromise. *See Thornburg v. Gingles*, 106 S.Ct. 2752, 2764 (1986) ("*Gingles*") (at-large elections are not *per se* violations of section 2; vote dilution and lack of proportional representation alone do not violate section 2; and the results test does not assume the existence of racial bloc voting, which must be proved).

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2 (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

42 U.S.C. § 1973(a) (1982).

Congress, in the middle of subsection (b), attempted to ensure that protected members of the electorate are able to effectively participate in the political process, by electing representatives of their choice. Inclusion of the modifying phrase "representatives of their choice" is also the result of compromise. Congress accepted the context in which representatives was used by *White* (multi-member legislative districts for the Texas House of Representatives) and limited "representatives" to mean legislators. *See infra* at pp. 9-10.

Section 2 is the culmination of the give-and-take of the political process. Recognizing this, Congress admonished the courts, when construing and applying it, to take "a 'functional' view of the political process, and to conduct a searching and practical evaluation of reality." *Gingles*, 106 S.Ct. at 2775 (citations omitted). The reality here is that judges are not representatives.

Determination of whether certiorari should be granted turns solely on interpretation of the meaning of "representatives" in the 1982 Act: Did Congress intend to include elected state judges in the term "representatives?" The answer is found in the interplay between the addition of a results test and adoption of the limiting language from *White* .

II. The Shortcomings of the *Chisom* Court's Analysis

The *Chisom* court, in concluding that section 2(b) reaches elected state judges, employed a four-part analysis -- a plain language analysis, a legislative history analysis, a comparative analysis of section 5 of the Voting Rights Act with section 2, and an analysis which relied upon the Attorney General's interpretation of section 2. At each analytical juncture, the *Chisom* court took the wrong turn.

A. The Plain Language

Without much adornment, the *Chisom* court simply observed that the " ' "plain meaning of [the language in section 2] reaches all elections, including judicial elections" and that the pre-existing coverage of section 2 was not limited by the 1982 congressional amendments.' " *Chisom*, 839 F.2d at 1064 (brackets added by the court). Employing ordinary tools of statutory analysis suggest a different conclusion.

1. The Plain Meaning Rule

"The starting point in every case involving construction of a statute is the language itself." *Watt v. Alaska*, 451 U.S. 259, 265 (1981). If the words of a statute in their ordinary and common usage "convey a definite meaning, which involves no absurdity, . . . then that meaning . . . must be accepted" as the expression of Congress' legislative purpose. *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). *See INS v. Cardoza Fonseca*, 107 S.Ct. 1207, 1213 (1987) ("*Cardoza*") (legislative purpose is expressed by the ordinary meaning of the words used); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

Reference to the lexicon is one way to establish plain meaning. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 231 (1975) ("DICKERSON"). The lexicon contrasts, rather than equates, representatives and judges. A representative is "a person chosen by the people to represent their several interests in a legislative body," but a judge is a person "who presides in some court." BLACK'S LAW DICTIONARY 676 & 435 (abridged 5th ed. 1983). Individuals elected to the legislative branch represent the people whereas individuals elected to the judicial branch serve the people. *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807

(1972). Congress itself, implicitly recognizing the representative-servant distinction, has never defined representative to include a judge,[3] but, consistent with common parlance, has defined representative as a legislator. *See* 46 U.S.C. § 1244 (representative is synonymous with a member of Congress which includes delegates to the House of Representatives from the District of Columbia, Guam, and the Virgin Islands). In an unguarded moment, the Fifth Circuit recently recognized, consistent with common parlance, that judges are not representatives. *See Hatten v. Rains*, 854 F.2d 687, 696 (5th Cir. 1988) ("*Hatten*") ("Judges, even if elected, do not serve a primarily representative function."); *Id.* at 696 (Garwood, J., joined by Jolly, J., specially concurring) ("[J]udges are not representatives."). Such unguarded statements, of course, speak volumes about the plain meaning of "representatives."

The difference between representatives and judges perhaps explains why Congress did not apply the results test of section 2 to elected judges. Representatives work as a body in which every protected class should have representation. The legitimacy of the work of a representative body depends on its inclusiveness. Judges, however, work alone to administer the law given them by the representative branch. *See Forrester v. White*, 108 S.Ct. 538, 544 (1988) ("The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform."). The legitimacy of a judge's work comes from election by the community as a whole and could be seriously undermined if the judge were elected from a single constituency.

A second way to establish plain meaning is to review the historical and cultural context of the language.

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3 *See, e.g.*, 15 U.S.C. § 381 (representative is not an independent contractor); 29 U.S.C. § 152 (representative means a person or labor union); 39 U.S.C. § 3005 (representative means an agent or representative acting as an individual); 45 U.S.C. § 151 (representative means a person or labor union).

DICKERSON at 105-11. Our national history treats a representative differently than a judge. The distinction between the representative and judicial branches -- a fundamental principle of both federal and state constitutional law, typically expressed in the separation of powers doctrine -- is a permanent cornerstone of our national jurisprudential ethos.

Wells v. Edwards, 347 F.Supp. 453, 454 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973) ("*Wells*"), which held "that the concept of one-man, one-vote apportionment does not apply" to the judiciary, distinguished legislators from judges by focusing on the different governmental functions performed by each.

> Manifestly, judges . . . are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency.
>
> . . . .
>
> Judges do not represent people they serve people.

347 F.Supp. at 455. Congress' amendment of section 2 and use of "representatives" was against this backdrop of historical understanding.[4]

The term representative has an even more specific historical context. Congress purposely borrowed section 2(b)'s language containing the term representative from *White v. Regester*. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 32, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 210 ("In each case the courts looked to

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[4] The linguistic difference between representatives and judges is so great that the two terms can neither be considered identical nor does one include the other. *Cf. Cardoza*, 107 S.Ct. at 1213 ("The linguistic difference between the words 'well founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference . . ."). *Cf. Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (dependent child does not include an unborn child because Congress used the word child to refer to an individual already born).

determine whether, in the words of both *White* [citation omitted] and the present committee amendment of section 2, the 'political processes' were 'equally open' and whether the members of the minority group had the same 'opportunity' as others in the electorate to 'participate in the political processes and to elect representatives of their choice.' "), ("S. Rep. 417").

In delineating the burden a plaintiff must sustain in order to prove that a multi-member district invidiously eliminates or minimizes the voting strength of protected racial groups specifically, *White* referred to the legislative branch:

> The plaintiffs' burden is to [show] . . . "that its members had less opportunity than did other residents in the district to participate in the political processes **and to elect legislators of their choice.**"

White, 412 U.S. at 766. Congress' transmutation of *White's* "legislators" into section 2(b)'s "representatives" is merely recognition that the two terms are synonymous and used interchangeably. *See Davis v. Bandemer*, 478 U.S. 109, 123 (1986); *Connor v. Finch*, 431 U.S. 407, 416 (1977).

Finally, any question about the plain-meaning of statutory language is conclusively settled where Congress knowingly borrows language that carries an established judicial interpretation. *See Rodriguez v. U.S.*, 107 S.Ct. 1391, 1393 (1987) ("*Rodriguez*") ("[I]n passing the CCCA, Congress acted -- as it is presumed to act -- with full awareness of the well established judicial interpretation . . .") (citations omitted). Congress' use of representatives, with the understanding that they are legislators as defined by *White*, directly supports the position that the plain meaning of representatives excludes judges.

2. The Clear Statement Rule

The clear statement doctrine, a second, equally powerful rule of construction, also governs the reading of section 2. This Court requires Congress, when passing legislation that "alter[s] the relationship between the States and the Nation," to expressly state its intention in unmistakable language in the statute itself. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *see Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985) (Eleventh Amendment context). A state's sovereign interest in maintaining the integrity of its judicial system by selecting the method in which its judges will be chosen imposes on Congress the obligation to expressly and clearly state in unmistakable statutory language any intention to disrupt or regulate a state's choice.

Congress failed to express a clearly conceived intent in unmistakable language to alter the relationship between the states and the federal government and disrupt the states' choice in how their judges are chosen.

3. The Statutory Amendment Rule

Analysis of the structure of the language of subsection (b) also confirms that representatives do not include judges. Different terminology in the amendment of an act "indicates [congressional] intent to change the object of the legislation." *United States v. Dickerson*, 310 U.S. 544, 561 (1940). *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (" 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ").

Congress' addition of a "results test" (making it easier for plaintiffs to prove a section 2 violation) along with the addition of "representatives" from *White* (which specifically referred to legislators) strongly indicates a change in the

manner in which section 2 operates to alleviate voting discrimination.

The *Chisom* court failed to grasp that, as Congress expanded the act to include a results test, it restricted the class of officeholders to whom such a test would apply. Ignoring the warning of *Rodriguez*, 107 S.Ct. at 1393, the *Chisom* court erroneously "and most impermissibly relied on its understanding of the broad purposes" of section 2 (safeguarding the voting rights of protected classes) to reach its conclusion that section 2 applies to state judges. Concurrently, other legislative considerations were at work, ultimately finding their embodiment in the term "representatives." Thus, the *Chisom* court's reliance on Congress' purpose in enacting section 2 in support of its plain language analysis is not persuasive, especially in light of section 2's language and its legislative history. *See Rodriguez*, 107 S.Ct. at 1393 (omissions and brackets by the Court) ("Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . .' [there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute.").

B. The Legislative History

Once the plain-meaning of the language of a statute settles the question of legislative intent, legislative history is reviewed "to determine only whether there is 'clearly expressed legislative intention' contrary to that language which would require [a court] to question the strong presumption that Congress expresses its intent through the language it chooses." *Cardoza, supra,* 107 S.Ct. at 1213 n.12. The plain-meaning presumption is so strong that "going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best circumstances." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982).

A review of the legislative history concerning the 1982 Act reveals four salient points, each of which casts doubt on any congressional intent to apply section 2 to judges.

The 1982 Act was passed in response to *Bolden*, which concerned elected policy makers who sit as a body. The 1982 Act incorporated the standards and language of *White*, including the definition of a representative as a legislator. *See supra* pp. 9-10.

Section 5, which this Court has held to cover judicial elections, *see Haith*, *infra*, at p. 15, and section 2 are entirely different sections with entirely different purposes.[5] Indeed, the distinctions become critical in light of the fact that section 5 does not use the limiting term "representatives."

And finally, a review of the legislative history reveals that, the overwhelming bulk of the discussion involving the impact of section 2 never focused on whether the judiciary was to be included in the amendment. Whether the judicially untested idea that judges were to be covered by section 2 was a matter never seriously debated. Certainly, if Congress intended such a major intrusion into previously untouched state matters, "there would have been lengthy debate on this point." *Quern v. Jordan*, 440 U.S. 332, 343 (1979). There was no debate at all.

Nothing in the legislative history overcomes the plain language presumption. When the plain language of an act settles a question of statutory construction, as the plain language of section 2 does here, and when "nothing in the legislative history remotely suggests a congressional intent contrary to Congress' chosen words, . . . any further steps

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5 The subcommittee on the Constitution of the Senate Committee on the Judiciary, after substantial debate on the differences between section 2 and section 5, concluded that the omission from section 2 of language used in section 5 was "conspicuous and telling." The subcommittee, moreover, noted "the fact that Congress chose not to utilize language in section 2 that it expressly used in sections 4 and 5 (i.e., 'effects') to be far more persuasive of original congressional intent . . . ." SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., REPORT ON THE VOTING RIGHTS ACT 22, 23 (Comm. Print 1982).

take the courts out of the realm of interpretation and place them in the domain of legislation." *United States v. Locke*, 471 U.S. 84, 96 (1985). The court below, in interpreting section 2 to encompass judicial elections, stepped into the realm of legislation.

C. Senator Hatch's Comment

Senator Orrin Hatch, a leading opponent of the Act, commented in the Senate Report that a political subdivision "encompasses all governmental units, including city and county councils, school boards, *judicial districts*, utility districts, as well as state legislatures." *Chisom*, 839 F.2d at 1062 (citing S.Rep. 417) (emphasis by the court). The *Chisom* court over-exerts itself and treats Senator Hatch's comments as "persuasive evidence of congressional understanding and belief that section 2 applies to the judiciary." 839 F.2d at 1062. Giving such weight to so fine-grained a reading of the statement of one Senate opponent of a bill is outside even the expansive boundaries of statutory interpretation.

If Senator Hatch's comment was sincere, he misunderstood the words of the statute. Congress in subsection (b) employed "political subdivision" in the following manner: "The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered . . ." Political subdivision directly modifies "state," has no relation to "representatives," and relates to the totality of circumstances in the newly enacted "results test."

Senator Hatch's comment should be given little or no weight for two additional reasons. "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), and "speeches by opponents of legislation are entitled to relatively little weight in determining the meaning of the Act in question." *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 (1973).

This Court has warned that the colloquies of witnesses and even individual Congressman should seldom overcome the plain-meaning of the language in a statute. *Regan v. Wald*, 468 U.S. 222 (1984). Indeed, to allow the "clear statutory language to be materially altered by such colloquies, which often take place before the bill has achieved its final form, would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Id.* at 237. Giving weight to Senator Hatch's comment undermines the enacted and signed language of section 2.

D. Section 5 and Section 2

The *Chisom* court also mistakenly relies on *Haith v. Martin*, 618 F.Supp. 410 (E.D. N.C. 1985), *aff'd mem.*, 106 S.Ct. 3268 (1986) (*"Haith"*). *Haith* held that the preclearance requirement of section 5 of the Voting Rights Act applies to judicial election systems. The *Chisom* court misapplies *Haith* to support the proposition "that if section 5 applies to the judiciary, section 2 must also apply to the judiciary." 839 F.2d at 1064. The *Chisom* court relied on the "virtually identical" language defining the scope of section 2 and section 5 to reach its conclusion. 839 F.2d at 1064. Section 5, however, reads:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . .

The *Chisom* court's comparison fails. Section 5 does not specifically, or even tacitly, condition its applicability to election systems pertaining to representatives, as does section 2. Section 5 offers no support for the *Chisom* court's section 2 analysis.

E. The Attorney General's Role

The *Chisom* court also inappropriately relies on the Attorney General's *amicus curiae* brief (in which he argued that the plain meaning of section 2 reaches judicial elections) as "persuasive evidence of the original congressional understanding of the Act." 839 F.2d at 1064.

In doing so, the Fifth Circuit misreads *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) (*"Sheffield"*), thereby according the Attorney General deference to which he is not entitled. In *Sheffield*, the Court held that "in light of the extensive role . . . Attorney General Katzenbach played in drafting the statute[,]" and his "key role in the formulation of the [1965 Voting Rights] Act," great deference should be given to his interpretation of the Act. *Id.* at 131-32. Attorney General Katzenbach was instrumental in attaining passage of the Act and wholly supportive of the purpose of the Act. Attorney General Meese, and his Justice Department, however, did not play any role in drafting the 1982 Act. Thus, there is no reason to accord the Attorney General's view special deference here.

Moreover, "[a] reviewing court 'must reject administrative constructions of [a] statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.' " *Securities Industry Ass'n v. Board of Governors of the Federal Reserve System*, 468 U.S. 137, 143 (1984). *Cf. Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983) ("[D]eference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions made by Congress."). The *Chisom* court's deference to the Attorney General's construction was inappropriate because the Justice Department did not play the role contemplated by *Sheffield* and because the Attorney General's construction frustrates Congress' intent.

III. Significant Protections Remain

Rejection of the *Chisom* court's holding would not leave minority voters unprotected in their exercise of the franchise, the fear of which may have silently crept into the Fifth Circuit's analysis.

First, and most obviously, Congress could react to a rejection by this Court of the *Chisom* holding just as surely and quickly as it did to this Court's *Bolden* decision. Given the earlier discussion about the need for Congress clearly to express its legislative intent to intrude into traditional state functions (such as judicial districting), *see* p. 11, *supra*, Congress should have an opportunity to debate this heretofore undebated issue. Such restraint seems a sound jurisprudential response to the problem being brought to the Court's attention.

Second, both the Constitution and the Voting Rights Act continue to offer significant protections to minority voters in connection with judicial elections. The Fifteenth Amendment still prohibits intentional acts of official racial discrimination against those seeking to exercise their franchise in judicial elections. *See Bolden*. In the *Chisom* case itself, for instance, proof of intentional discriminatory acts in the establishment of the at large judicial district being challenged still may succeed, notwithstanding this Court's rejection of the application of the results test to such judicial elections. The Voting Rights Act itself, as canvassed and found constitutionally valid in *Katzenbach*, contains a host of major protections for those seeking to exercise their franchise when electing judges. These protections include ballot access and, as held in *Haith, supra*, preclearance of various electoral changes involving judicial elections.

The availability of these protections highlights the extreme narrowness of the legal issue raised by *Chisom*. It does not involve a constitutional issue; reversing the Fifth Circuit would not permit intentional vote dilution in judicial races; and minority voters would still be entitled to a host of statutorily based ballot access protections. Whether

Congress in 1982 permitted the application of the results test to minority vote dilution claims in judicial elections is the only legal issue confronting the Court. It is a question in need of a final answer.

CONCLUSION

The Court need not await further developments and possible conflicts in the inferior federal courts. The issue is too straightforward to require it and too important to permit it. Instead, the Court should issue the requested writ of certiorari to settle this crucial issue.

Respectfully submitted,

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